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Citation:

Page Keeton; Seth S. III Searcy, New Penal Code for Texas, A, 33 Tex. B.J. (1970)

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Wed Dec 6 08:51:52 2017

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LEGISLATIVE ITEM

A New Pen

PAGE KEETON
Austin

The State Bar Committee on Revision of the Penal Code will offer the Legislature in January the first new Penal Code in nearly 115 years. The proposed code is the product of five years' effort by a special State Bar committee created to reform our long-neglected penal law. In preparing the proposed code Texas joins 33 other American jurisdictions and Great Britain who are now revising or have recently revised their penal law. This wave of penal law reform is long overdue, in Texas and elsewhere in the United States, because the criminal law has been sorely neglected for over a century.

The State Bar Board of Directors at its October meeting authorized the committee to submit the proposed code to the Legislature as a comprehensive plan for the reform of our penal law.

The Revision Process

The Penal Code Revision Project commenced in 1965 following enactment of the recodified Code of Criminal Procedure. The project is a joint law reform effort of the State Bar Committee on Revision of the Penal Code, chaired by Dean Page Keeton of the University of Texas School of Law, and the Texas Legislative Council staff.

Personnel

The State Bar committee comprises 29 members and is the policy-making body of the revision project. The bar committee is assisted by two advisory committees, on corrections and law enforcement, by reporters, who are mostly faculty members from Texas law schools, and by a reporters' advisory committee. The Texas Legislative Council provides the permanent project staff of four lawyers, two secretaries, and six part-time student assistants; the staff maintains the project office at the University of Texas School of Law. All project members are distinguished representatives from a variety of disciplines intimately familiar with our entire criminal justice system. All but the project staff serve without pay.

Representative bar committee members include the Honorable K. K. Woodley and John F. Onion Jr., respectively the present and successor presiding judge of the Court of Criminal Appeals; District Judges Archie S. Brown and James E. Barlow from San Antonio and the Honorable John M. Barron and T. Gilbert Sharpe, associate justices of the Houston and Corpus Christi Courts of Civil Appeals, respectively.

Carol S. Vance, the Houston district at-

de for Texas

SETH S. SEARCY III
Austin



torney, presents the prosecutors' viewpoint to the committee, and he is joined by Frank Coffey, his Fort Worth counterpart, and by several former prosecutors on the committee, George Gray from Dallas and Travis Shelton from Lubbock, to mention only two.

The criminal defense bar is represented by, among others, Sam Daugherty and Emmett Colvin from Dallas, Frank Maloney and Hume Cofer from Austin, and Earl Smith from San Angelo.

The Texas Legislature is well-represented by, for example, Senator Charles F. Herring of Austin, who serves as vice-chairman of the bar committee, and by Representative Jim Nugent of Kerrville.

The main committee's two advisory committees, on corrections and law enforcement, include among others Dr. George Beto, director of the Department of Corrections, and Mr. C. Glenn Conner, formerly an inspector with the Department of Public Safety and now a member of the Criminal Justice Council.

Several members of the project also serve on the State Bar Committee for Study of the Code of Criminal Procedure. Judges Woodley and Onion, Hume Cofer, and Earl Smith have already been mentioned. In addition, Luther Jones of Corpus Christi and Phil Burleson of Dallas

serve both the project and the criminal procedure committee.

All project members are identified at the end of this article.

Process

Drawing on penal law reform efforts recently completed or underway in 32 other states and the federal government, as well as the American Law Institute's Model Penal Code, the committee over the past five years re-examined the entire fabric of Texas penal law. Each report to the committee on a particular penal law topic reviewed existing Texas law, considered other jurisdictions' and the Model Penal Code's treatment of the topic, proposed a draft statute, and explained what the statute did and why it changed Texas law, if it did. Reports usually required six to nine months to prepare, and before a report was submitted to the committee it was reviewed first by the staff and then by the reporters as a group. Thus, when the committee received a report, policy issues were sharply focused, alternative solutions and their consequences clearly set out, and statutory language painstakingly refined.

Committee meetings convened to con-

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sider reports, of which there have been 21 to date, lasted at least a day and a half, and sometimes two days; at the meetings committee members subjected the reports and reporters to a grueling review that often resulted in substantial revision of the draft statutes proposed. Meeting discussions were tape-recorded and minutes of the meeting prepared summarizing the discussion and setting out the revisions directed by the committee. Finally, detailed explanatory comments were prepared for each approved section of the draft code.

Finances

The state, the State Bar of Texas, and many private foundations have contributed generously to finance this law reform project.

The Texas Legislature appropriated \$226,988 to the Texas Legislative Council to staff the project, and the Texas Criminal Justice Council granted \$23,000 for general support.

The State Bar of Texas allocated \$41,582 to the State Bar Committee on Revision of the Penal Code.

And the following private foundations donated \$74,000 to finance the necessary research for the project: Brown Foundation, James R. Dougherty Jr. Foundation, Fair Foundation, William Stamps Farish Fund, Fondren Foundation, Haas

KEETON, SEARCY

Page Keeton has been chairman of the State Bar Committee on Revision of the Penal Code for the past five years. Dean of the University of Texas School of Law in Austin (since 1949), he is an editor of "Law of Torts," an American Casebook series, and serves on the American Law Institutes' advisory committee for revision of the Restatement of the Law of Torts. Dean Keeton earned a Doctor of Juristic Science degree from Harvard University in 1936 and both B.A. and LL.B. degrees from the University of Texas in 1931.

Seth S. Searcy III is director of the Penal Code Revision Project, co-sponsored by the State Bar of Texas and the Texas Legislative Council. He has worked on the project since June 1967. Previously, he was on the staff of the Texas Legislative Council, and in 1966 directed the recodification of the business and commercial law. Mr. Searcy is a graduate of the University of Texas School of Law.

Foundation, Hogg Foundation for Mental Health, Houston Endowment, Moody Foundation, Sears Foundation, Strake Foundation and Texas Instruments Foundation.

Finally, West Publishing Company, compiler of the Texas statutes, donated a substantial sum in the form of law books used by the project staff, and has published and distributed the draft code as a public service.

Without all of this financial assistance a law reform project of this magnitude would not have been possible, and all connected with the project are deeply grateful to the contributors.

Defects in Present Penal Code

The past 114 years, following enactment of the Texas Penal Code, have witnessed significant changes in our society—the transformation from an agricultural to an industrialized economy, the move of three-fourths of all Texans from rural to urban communities, a civil war and two world wars, an increasing crime rate, to mention only a few—but our penal law has not kept pace. Space does not permit an exhaustive list of defects in the present code, but some examples of them by category will serve to outline the task of this law reform effort.

Duplication and Complexity

Partly because of its age, partly because of the nature of our legislative process, and partly because of the recent and increasing popularity of the criminal sanction, the Texas Penal Code abounds with duplication. Essentially the same criminal conduct is made the subject of many different offenses, depending on the identity of the offender, the identity of the victim, or the nature of the interest harmed. Theft, for example, rates 60 articles in the Penal Code, and official misconduct 57. The proposed code consolidates and restates the theft offense in 10 sections typed on 8 pages. Three sections in the proposed code deal with official misconduct on the theory that each type of public official doesn't require a separate statute. Malicious mischief was defined in 37 articles in the Penal Code until 1969, when the Legislature added a 38th; the proposed code deals with the problem in a single section. Bribery, which requires 35 articles now, is con-

solidated in a single section. Escape presently requires 27 articles, which depend for their application on the location escaped from and the identity of the escapee, but the proposed code defines escape in two sections. Additional examples of duplication are numerous, but those given demonstrate the great reduction in the sheer bulk of our penal law accomplished by the proposed code.

Consolidation also clarifies and simplifies the law. The consolidated theft offense, for example, abolishes the ancient common-law distinctions, mostly based on the method of acquiring property, that have plagued Texas for more than a century. The present separate offenses of theft, theft by false pretext, conversion by bailee, theft from the person, shoplifting, acquisition by theft, swindling, embezzlement, extortion, receiving or concealing embezzled property, and receiving or concealing stolen property—all of these separate offenses of the present law are combined and restated as a single offense: theft.

Another plague of the common-law eradicated by the proposed code is the cobweb of distinctions dealing with the responsibility of parties to crime. The label presently pasted on a party—principal, accomplice, accessory—makes a critical difference, and so far as the committee can determine, Texas is the only jurisdiction in which it still makes so much difference. Of course it shouldn't: if a defendant intends to promote or assist in the commission of an offense and solicits, directs, aids, or attempts to aid another in committing the offense, he ought to be criminally responsible for the offense—and he will be under the proposed code—

irrespective of whether he was present when the offense was committed, kept kept watch, etc. He will be charged as a party—he won't have to be labeled—and if the evidence shows him less blameworthy than other parties, the sentencing and correctional authorities can take this into account.

Overcriminalization

Attempting to solve social problems with the criminal sanction, and making a crime out of everything we don't like, are fairly recent phenomena in this country. Every time they have met in recent years Legislatures have applied the criminal sanction to a variety of conduct with little regard to whether the conduct penalized is truly harmful, whether the criminal sanction can efficiently prevent and punish, and whether the new crime can be enforced by our already overworked law enforcement agencies. Some of the more obvious consequences of overcriminalization are undermanned police departments and understaffed prosecutor offices, crowded court dockets, a choked correctional system, and police inefficiency.

In reforming Texas penal law, the committee has consciously sought to decriminalize wherever consistent with the public safety. It has asked such questions as: Is it necessary to criminalize coin-matching and the Saturday-night poker game to prevent organized and exploitative gambling? Cannot prostitution, public indecency, and forcible sexual conduct be effectively deterred without making criminal every sexual experience outside wedlock? And is the full process of the

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criminal law really the best way to make a business competitor label as such his going-out-of-business sale, close his shop on either Saturday or Sunday, maintain elaborate records on his transactions in scrap metal, or tag as such all second-hand watches he sells? Unfortunately, the committee has found that much inappropriate criminalizing lies outside its mandate for reform, mostly in the many regulatory measures—e.g., occupational licensing, fish and game, traffic, alcoholic beverage control—but one improvement in this area the proposed code makes is to transfer these regulatory laws out of the Penal Code into more appropriate locations in the civil statutes.

Irrationality

A prime example of irrationality in the present Penal Code is the bewildering variety and combination of punishments. Articles in the code prescribe a fixed punishment; a maximum punishment only; a mandatory minimum and discretionary maximum punishment; a mandatory minimum punishment only; a combination misdemeanor and felony punishment; and a punishment consisting of a fine only, a fine *or* imprisonment, and a fine *and* imprisonment.

Irrational distinctions, duplications, and outright contradictions also abound in the sentencing area. For example, theft of 6 bushels or more of oranges is punishable by up to 10 years in the penitentiary, but theft of a truckload of watermelons is punishable by a maximum \$100 fine. Assault with intent to murder is punishable by a maximum of 25 years in the penitentiary, assault with intent to rape by a maximum of life imprisonment. Destruction of line work on a survey is punishable by a maximum fine of \$500 under Article 1365, \$1,000 under Article 1364, and \$1,000 and up to three months in jail under Article 1358—and all these punishments for the same line work.

Not unexpectedly, the present Penal Code reflects many value judgments of a bygone era. Horse theft, for example, is punishable by a maximum of 10 years' imprisonment, whereas murder without malice authorizes only 5 years. And if a wife commits an offense at the command

or persuasion of her husband, she is liable under Article 32 to receive only one-half the maximum punishment authorized for the offense she commits.

Organization and Language

The proposed Revised Penal Code is organized functionally, with offenses grouped according to the harm they inflict. This was the basic pattern of the 1856 Penal Code; now, however, mostly unrecognizable because of the passage of time.

The new code employs the format prescribed by the Texas Legislative Council for all state statutes. This format uses the section as the basic unit and numbers sections consecutively within chapters using a decimal numbering system that permits unlimited expansion to accommodate future amendment.

The committee has scrupulously endeavored to draft the new code in modern American English with an economy of language, and all of these improvements in organization, format, style, and language will make the penal law easier to find, read, and understand.

Significant Changes in Texas Penal Law

Although obviously impossible to list all changes proposed by a code of this magnitude—the code's typed manuscript exceeds 875 pages, for example—a summary of the more significant changes will serve to outline the scope of the revision project in terms of the reform objectives listed below.

Objectives of the Revised Penal Code

The major objectives of the proposed Revised Penal Code, broadly stated, are:

(1) Consolidate, simplify, and clarify the substantive law of crimes.

(2) Modernize a Penal Code designed for the preindustrialized, rural, and underpopulated Texas society of a century ago.

(3) Identify and prohibit, with as much precision as possible, all significantly harmful criminal conduct.

(4) Rationally grade offenses, according to the harm they cause or threaten, and sensibly apportion the sentencing authority between the judiciary and correc-

tional system.

(5) Codify the general principles of the penal law.

(6) Collect in a single code all significant penal law, transferring to more appropriate locations in the statutes regulatory and similar laws that merely employ a penal sanction.

Codification of General Principles of Penal Law

The general principles of the penal law—for example, the requisites of criminal responsibility, the mental element in the definition of offenses, general defenses to criminal responsibility—have never been satisfactorily codified in this state. Case law development of these principles is incomplete and sometimes contradictory, principally because case decisions are limited by the particular facts before the court. Title 2 of the proposed code, however, comprehensively articulates the general principles of penal law and applies them in the definitions of specific offenses and elsewhere throughout the code.

Mens Rea

Surely a major achievement of the American Law Institute's Model Penal Code is its analysis of the traditional mens rea, or guilty mind, concept and translation of that concept into four carefully defined terms: intentional, knowing, reckless, and criminally negligent. All of the recent penal code revisions, both proposed and enacted, have used this analysis and, with slight modification, the very terminology of the Model Penal Code.

These four terms in the proposed Texas code replace a welter of ambiguous and sometimes contradictory terms in the present law. The committee identified 67 different terms now used in the Penal Code, which seldom attempts a comprehensive and precise definition of these terms and thus leaves the courts to struggle with the problem of definition in specific cases with varying degrees of success.

The proposed code carefully defines the four terms describing the mens rea concept—and uses these terms, and only these terms, in the definition of each offense.

Complicity

Under present law the label pasted on a party to crime—principal, accomplice,

accessory—makes a critical difference. Under the proposed code, on the other hand, a defendant who intends to promote or assist in the commission of an offense, and who solicits, directs, aids, or attempts to aid another in committing the offense, will be criminally responsible for the offense and can be charged directly as a party.

Corporate Criminal Responsibility

A new concept introduced by the proposed code is that of corporate criminal responsibility. Texas is the only state that exempts corporations and unincorporated associations from criminal responsibility; so far as the committee can learn, the exemption is the result of historical accident. A subchapter in the proposed code carefully specifies the circumstances under which corporations and unincorporated associations are responsible for the criminal conduct of their agents. In addition, a section in the sentencing chapter of the code prescribes a range of monetary fines for a convicted corporation or association. Finally, a conforming amendment to the Code of Criminal Procedure creates procedures for subjecting a corporation or association to the criminal process.

Defenses

Two chapters in the proposed code collect and carefully define all general defenses to criminal responsibility recognized by the penal law. The defenses of insanity, duress, and entrapment, for example, are spelled out in Chapter 8. Chapter 9, for the first time in Texas, describes all the circumstances justifying conduct that is otherwise criminal—for example, the use of force in self-defense

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or to prevent crime and burning down a building to prevent the spread of fire. And again for the first time in Texas another chapter specifies the procedural and evidentiary consequences of the various types of defenses (as well as exceptions and presumptions) employed throughout the proposed code.

Offenses Against the Person

Violence against the person is harshly treated in the proposed code. Criminal homicide law is greatly clarified and simplified, and aggravated assault—an assault causing serious bodily injury, against a peace officer, or committed with a deadly weapon—is graded a felony. For the first time all sexual offenses are collected in a single place and are graded for punishment purposes according to the harm they inflict—with forcible rape and sodomy, for example, punished the most severely. Finally, the proposed code simplifies the definitions of kidnapping and false imprisonment, reformulates the crimes of incest and bigamy to better protect relationships among family members, and creates a new offense of interference with child custody. All of these improvements will ensure much greater protection of bodily safety.

Murder, Manslaughter, Criminally Negligent Homicide

These three offenses constitute criminal homicide under the proposed code. The murder and manslaughter offenses clearly distinguish between the unprovoked intentional or knowing killing, which has traditionally been treated as murder, and the reckless killing, which the common-law designated involuntary manslaughter. The present law's concept of malice, which is virtually meaningless, is deleted, and the proposed code instead uses the carefully defined terms "intentional" and "knowing" to describe the culpable mental state necessary to establish murder, and "reckless" to describe that for (involuntary) manslaughter.

The proposed code greatly simplifies the present offense of negligent homicide. The confusing and unnecessary distinction between first and second degree negligent homicide is abolished, and the con-

cept of criminal negligence is much more precisely articulated in the proposed code.

Sexual Offenses

The present offenses of fornication, seduction on promise of marriage, abduction for purpose of marriage, adultery (except in its aggravated form, which is bigamy), bestiality in private, and consensual heterosexual deviate conduct in private are eliminated by the proposed code.

These offenses are rarely prosecuted today, but more importantly the committee believes the state has insufficient interest in the consensual sexual conduct of adults in private to justify subjecting that conduct to the criminal law. (An exception is homosexual conduct between consenting adults in private, which the proposed code continues as an offense.) At the same time the code treats forcible sexual offenses, such as rape and forcible sodomy, most severely.

Sexual offenses involving children, such as statutory rape and fondling, are more precisely defined through use of a uniform age of consent, 16. A two-year age differential factor is also introduced to exclude from the talons of the criminal law males in the same age group as their so-called victims. These innovations are consistent with the rationale of the incapable-of-consent sexual offenses, which is to prevent imposition by the older and presumably more experienced male.

Family Offenses

A new antiabortion offense is necessary to replace the present Texas law recently declared unconstitutional by a three-judge federal district court. The committee proposes two alternative solutions to this perplexing problem of our contemporary society: the first alternative authorizes abortion with the consent of the woman by a licensed practitioner of medicine, while the second, more restrictive alternative sets out three carefully defined grounds justifying abortion—for example, that the pregnancy resulted from incest or forcible rape.

The proposed code creates a new offense specially designed to deal with the problem of parental kidnapping. Interference with child custody is graded a felony when the child is removed from the state, thus facilitating extradition and the

child's return to the jurisdiction of a Texas court.

Theft and Other Offenses Against Property

A Consolidated Theft Offense

One of the most far-reaching changes in the proposed code involves the simplification and clarification of the law of theft. In the present Penal Code the criminal misappropriation of another's rights in property is governed by a multiplicity of separate offenses, each distinguished from the other by nice technicalities that have no bearing on guilt or innocence, and it is frequently impossible for the prosecution to determine before trial which theft label the facts of a particular case fit. As a result, no part of the criminal law has produced more confusion, more appellate litigation, more reversals on technicalities, and more inefficient administration of the law than the multitude of theft offenses.

For this reason the committee has consolidated theft crimes into a single, comprehensive offense aimed at the true harm produced—criminal deprivation of another's property rights—however that harm is accomplished. Under the proposal the method used to acquire property unlawfully is immaterial; if it is so acquired with the requisite guilty mind, it makes no difference how the acquisition is labeled. An employee, for example, cannot escape conviction by proving, in response to a charge of embezzlement, that he took possession of the property outside the scope of his employment and was, therefore, a thief, not an embezzler.

The proposed theft offense also closes several loopholes overlooked in present law. For example, swindlers and extortionists frequently escape criminal sanction because the statutes identify only particular types of fraud and coercion. The proposed theft offense, however, covers anyone who acquires another's property by intentionally misleading or frightening him.

A third major reform in the theft area permits felony treatment of thieves who steal small amounts from multiple victims. Under present law, each separate victim and each separate acquisition is a separate crime, and by carefully limiting the value of property acquired each

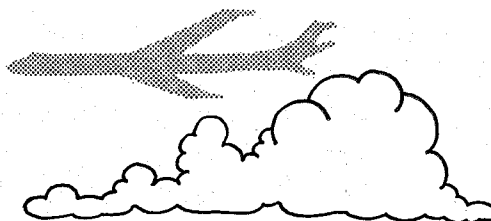
time, an enterprising thief can steal large amounts but suffer only misdemeanor punishment. The proposal permits aggregation of the amounts stolen from each victim at different times if the thefts are part of a single scheme.

The aggregation feature, together with a provision for felony treatment of repeated misdemeanor thieves, makes it possible to raise the cutoff value between felony and misdemeanor theft from \$50 to \$250, a figure more in line with contemporary property values in view of the serious consequences of a felony conviction.

Other Property Offenses

Another important feature of the proposed code is the addition of a general criminal trespass offense. Texas has never had one, and as a result law enforcement officials have had to rely on vague and overbroad loitering and vagrancy-type crimes. The proposed code also provides a single offense for damaging or destroying the property of another, an area now

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covered by a confusing array of narrowly conceived offenses prohibiting damage to or destruction of specific kinds of property, such as lumber, fences, levees, and topographical surveys. And the proposed code includes a comprehensive list of credit and other business frauds, an area presently covered only sporadically. Finally, all the offenses against property—burglary, robbery, arson, forgery, etc.—are simplified and clarified to eliminate procedural and technical obstacles to efficient administration and enforcement of the criminal law.

Offenses Against Public Order and Decency, Health, Morals, Safety

Disorderly Conduct

Although disorderly conduct type offenses in the proposed code cover a narrower field than in present law, it is because the committee has chosen to treat many problems traditionally regarded as disorderly conduct problems under other provisions of the code. For example, the offenses of loitering, vagrancy, and disorderly conduct have sometimes been used to justify the interruption of persons found in suspicious circumstances. The committee recognizes that the power to interrupt these persons is necessary, but it has chosen to provide this power directly—through a carefully drawn stop and frisk authorization that for the first time in Texas furnishes law enforcement with step-by-step guidelines for dealing with the complex problems growing out of on-the-street encounters. Similarly, the proposed code contains precisely drafted prohibitions against trespass, criminal mischief, obstructing highways and other passageways, and disrupting meetings or processions; in the past all of these offenses have been treated under broad-gauged (and increasingly constitutionally suspect) disorderly conduct statutes.

Prostitution

Texas prostitution laws have also fared poorly in federal court, so the first task of the committee was to define precisely the prohibited conduct by focusing on what most agree are its most harmful manifestations: commercialized and ex-

ploitative sex and the affront of public solicitation. The proposed code accomplishes this, and carefully distinguishes for punishment purposes between the prostitute, those who aid her, and those who exploit her; the most severe punishment is reserved for the exploiters, particularly those carrying on a prostitution enterprise.

Gambling

The proposed code greatly simplifies and shortens the anti-gambling provisions of present law. This is accomplished by formulating a comprehensive definition of gambling, thus avoiding the need to create a separate offense, as does present law, for each particular game—for example, card-playing, dicing, policy betting, horse-race betting. This definition is instrumental both in reducing the bulk of present law (from nearly 100 articles to 8 sections in the proposed code), while at the same time broadening its coverage and distinguishing with more precision between promotional, exploitative gambling, which is often the bankroll of organized crime, and social gambling such as coin matching, bingo, and charity raffles.

Drug Offenses

The proposed code does not base penalty gradations on the distinction between "narcotic" and "dangerous" drugs. Rather, classification is based primarily on an assessment of the particular drug's potential for harm and abuse and secondarily on a consideration of the social costs of a particular criminal treatment. As a result, the proposed code defines three categories, "dangerous," "abusable," and "restricted," with illicit transactions in dangerous drugs (for example, heroin, most amphetamines and hallucinogens) carrying the highest penalties, those in abusable drugs (for example, marijuana and peyote) carrying a middle range of penalties, and those in restricted drugs (for example, codeine cough syrups, minor tranquilizers) carrying misdemeanor penalties. This more rational classification both increases and lowers penalties in the present law. For example, penalties for offenses involving amphetamines and hallucinogens, such as LSD and mescaline, are increased to felony grade; at the same time, the penalty for possession of marijuana, which is erroneously classified as

a narcotic under present law, is reduced from the absurdly harsh life term of present law but maintained at felony level.

Under the proposed code the nature of the illicit conduct involving drugs, as well as the classification of the drug involved, determines the severity of the penalty. Penalties are increased in transactions involving trafficking with minors and for subsequent offenders. Moreover, the proposed code discriminates between those who traffic in drugs for profit and users, with the more severe penalties reserved for the profiteers. Finally, the proposed code introduces a novel mitigation mechanism to permit reduction of penalty in cases involving noncommercial distribution or possession for personal use only. This mechanism places the burden of proof by a preponderance of the evidence on the defendant to establish the mitigating facts; however, mitigation is unavailable if transfer was made to a minor three years or more younger than the defendant.

Sentencing

The proposed code creates a new sentencing structure for Texas. The new structure for the first time rationally allocates sentencing authority between the Legislature, which grades an offense's seriousness; the court, which fits the punishment to the individual offender and facts of his offense; and the correctional authorities, which measure and act on the convict's dangerousness and rehabilitative potential. Unlike present law, which includes a specific penalty with the definition of each offense, the new structure allots all offenses into one of four categories of felony or into one of three categories of misdemeanor. All authorized punishments,

and the standards to guide their imposition, are then collected in a single place, Chapter 12 of the Revised Penal Code. Besides the benefit of having all sentencing law in one place, the proposed code creates a permanent punishment classification scheme that will encourage the rational grading of new offenses created by future Legislatures, and conversely, discourages the ad hoc and consequently disparate penalizing so prevalent in present law.

The Patchwork of Present Law

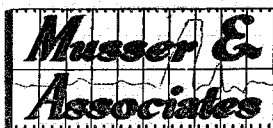
Many offenses in the present Penal Code impose a mandatory term of imprisonment, but because parole eligibility is tied to the term assessed, the Legislature's clear intent to incapacitate certain defendants for a minimum period of time is often frustrated. There is no rational pattern of punishments affixed in present law, which exist in bewildering variety and combination, but instead an accumulation of responses to crises perceived over the last century that rest uneasily on a theory of penal philosophy discredited

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long ago here and in Europe. The examples of irrational distinction, value judgments from an earlier day, and outright contradiction listed earlier speak eloquently to the need for thorough reform.

Rational Treatment of Offenders and Offenses

The four felony categories created by the proposed code authorize a minimum and maximum term of imprisonment, with parole eligibility tied to completion of the minimum term, so that the initial sentencing authority can ensure a minimum period of incapacitation for serious offenders. In addition, the proposed code for the first time in Texas distinguishes clearly between the ordinary offender, for whom long-term imprisonment is unnecessary and self-defeating, and the dangerous offender, for whom extended imprisonment is often essential to protect society. Finally, the proposed code punishes like offenses in like manner, with criminal homicide, armed robbery, burglary of a habitation, and other offenses involving violence against the person punished most severely, property offenses graded uniformly according to the value of the property misappropriated, damaged, or destroyed, and other offenses rationally graded according to the harm they threaten or cause.

Judge Sentencing

Except when the jury recommends probation and in capital cases in which the state seeks the death penalty, the proposed code vests the trial court, who will know most about the offender and his offense, with exclusive initial sentencing authority. The jury assesses punishment under present law, if defendant so elects, and the rules of evidence too often ensure that the jury knows very little about the man in the dock. Before sentencing under the proposed code, the court must conduct a separate, trial-type sentencing hearing, at which the state and defendant are entitled to appear with counsel, offer evidence and argue on an appropriate sentence, and before sentencing a defendant to the penitentiary the court must consider a pre-sentence report prepared by a probation officer. Finally, the court must

state for the record its reasons for assessing the punishment it did.

The proposed code, again for the first time in Texas, sets out detailed standards to guide the sentencing court in the exercise of its discretion. And to ensure that the standards are followed and sentences assessed evenhandedly throughout the state, the Court of Criminal Appeals is authorized to review the appropriateness and procedural and informational bases, as well as the legality, of sentences.

Conclusion

The State Bar Committee on Revision of the Penal Code does not offer the proposed code as a panacea for the criminal law crisis now plaguing our nation and state. The penal law is but one of several important tools necessary to govern society, and its reform, although essential, is by no means sufficient. The proposed code is offered, however, as the logical beginning of what the committee hopes will be a continuing law reform effort.

The committee is scheduled to meet again before the Legislature convenes to consider among other matters many helpful suggestions made by the State Bar Board of Directors. The revision process does not end with that meeting, of course, nor does it end with introduction of the code bill in the Legislature, nor even when the code (hopefully) is enacted. The committee will continue to review the code, and to this end earnestly solicits comment, suggestion, and criticism from all sources.

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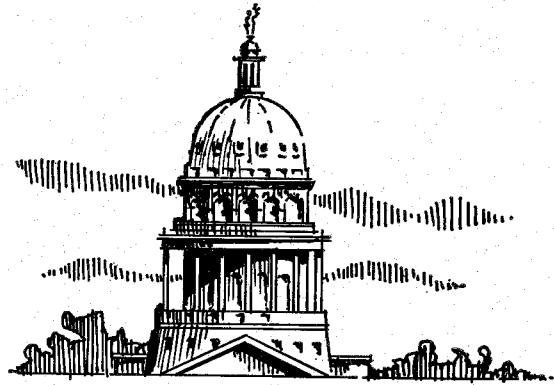
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